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U.S. Department of Homeland Security

Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 I Street, N.W.
Washington, D.C. 20536

[redacted]

File: EAC 02 034 50835 Office: Vermont Service Center Date: FEB 02 2004

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center. The director then affirmed his decision to deny the petition in response to a motion to reopen by the petitioner. The case is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a roofing company. It seeks to employ the beneficiary permanently in the United States as a roofer. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a statement and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor, and continuing. Here, the petition's priority date is December 31, 1997. The beneficiary's salary as stated on the labor certification is $21.64 per hour which equates to $45,011.20 per annum.

As evidence of the petitioner's ability to pay the proffered wage, counsel submitted a copy of the petitioner's Internal Revenue Service (IRS) Form 1120X (amended return) for 1997 which showed a taxable income of -$91,656, and a copy of the petitioner's IRS Form 1120 for 1999 which showed a taxable income of -$43,768.

In determining the petitioner's ability to pay the proffered wage, CIS will ordinarily examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well-established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); *see also Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage and denied the petition accordingly. The petitioner appealed that decision. The director treated the appeal as a motion, and affirmed his decision to deny the petition. The instant appeal, therefore, relates to the director's affirmation of his denial.

On appeal, counsel submits a copy of an amended Form 1120 for 1997 for the petitioner and copies of IRS Forms W-2 for various employees of the petitioning entity and argues that the beneficiary would replace part-time workers.

Counsel's argument is not persuasive. The funds paid to part-time workers were not retained by the petitioner for future use. Instead, these monies were expended on compensating the part-time workers, and, therefore, not readily available for payment of the beneficiary's salary in 1997.

The petitioner's amended Form 1120 for 1997 shows a taxable income of -$91,656. The petitioner could not have paid a salary of $45,011.20 from this figure. In addition, the tax return for 1999 continues to show an inability to pay the wage offered. It is noted that the record contains no financial information for the petitioner in 1998 or 2000. Pursuant to 8 C.F.R. § 204.5(g)(2), the petitioner must establish a continuing ability to pay the proffered wage.

Accordingly, after a review of the evidence submitted, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing to present.

Beyond the director's decision, it is noted that the letter submitted to establish that the beneficiary has two years of experience in the job being offered states that he worked for Schauble Construction of Little Falls, New Jersey, from October 1995 to January 1998 whereas the ETA 750, Part B, signed by the beneficiary, indicates that he worked for ANS Construction of Paramus, New Jersey, from October 1994 to December 1997. The record contains no explanation for this conflicting information.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.